92-187

Supreme Court, U.S.
FILED
JUL 28 1992
OFFICE OF THE CLERK

No. _____

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1992

ANTHONY INSERRA

Petitioner,

-vs-

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Was the ex post facto clause of the Constitution violated when the computation of the Sentencing Guidelines in a RICO conspiracy case was determined solely by a 1976 overt act and not by activity which straddled the effective date of the Guidelines?

II. Was 18 U.S.C. § 1961 (5) misapplied when the Court found a pattern of racketeering activity based upon a 1976 and a 1979 act and where the petitioner did not commit any enterprise related criminal acts between 1979 and 1989 when the enterprise terminated?

III. Is a single debt collection without more sufficient to support a RICO conviction or, as in the case of pattern, are there additional conditions which a Court must identify before the conviction can be upheld?

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OPINIONS DELIVERED IN THE CASE BY OTHER COURTS

On January 23, 1992, the United States Court of Appeals for the Second Circuit affirmed Petitioner's January 2, 1991 conviction for RICO conspiracy in violation of 18 U.S.C. § 1962(d) and consequent sentence of twenty years custody. This opinion is reported. United States v. Minicone, 960 F.2d 1099 (2d Cir. 1992) (1a). On April 30, 1992, The United States Court of Appeals for the Second Circuit, in an unpublished opinion, granted in part Petitioner's Motion for Reconsideration. (a) The original opinion was amended. However, this decision affirmed both Petitioner's conviction and sentence. (47a, 49a)

STATEMENT OF JURISDICTION

Petitioner, Anthony Inserra, moves this Honorable Court now for a writ of

certiorari and review of the Judgment of the United States Court of Appeals for the Second Circuit entered in the above-titled cause on April 30, 1992. (47a) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

Article 1, § 9, cl. 3 of the United States Constitution provides in relevant part:

> "No Bill of Attainder or ex post facto law shall be passed."

STATUTORY PROVISIONS INVOLVED

Title 18, United States Code, § 1961 (5) provides:

> "(5) 'pattern of racketeering activity' requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the

commission of a prior act of racketeering activity.

Title 18, United States Code, § 1961

(6) provides:

"(6) 'unlawful debt' means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate.

Title 18, United States Code, § 1962

(c) provides:

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to control or participate, directly or

> indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

Title 18, United States Code, § 1962 (d) provides:

> (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

STATEMENT OF THE CASE

On September 6, 1989, a Special Grand Jury returned a three count indictment that charged Petitioner with substantive RICO in violation of 18 U.S.C. § 1962 (c), RICO conspiracy in violation of 18 U.S.C. § 1962 (d), and conspiracy to transport stolen goods in interstate commerce in violation of 18 U.S.C. § 371; four other individuals were also charged.

The indictment alleged that the enterprise consisted of an association of individuals who had belonged to a criminal

enterprise which operated in the Utica, New York area between the 1973 and 1989.

The indictment alleged that Petitioner was a member of that enterprise and that he participated in five specific acts in furtherance of the enterprise:

1. In 1973, Petitioner and a co-defendant, acting upon orders of the enterprise leader, allegedly hired two men to beat up and rob two local bookmakers.

2. In 1974 or 1975, Petitioner and a co-defendant allegedly approached a local criminal who had borrowed money from the enterprise at excessive interest rates. Petitioner allegedly told the individual that "Ange wants that money".

3. In 1976, Petitioner and a number of other individuals allegedly participated in a murder. The victim was a hoodlum who had just been released from federal prison and who had threatened the lives of

Petitioner and other alleged members of the enterprise. The government claimed that while Petitioner did not personally participate in the actual shooting, he was involved in planning the murder. The government also asserted that Petitioner assisted in obtaining one of the many weapons used and that he monitored a police scanner on the night of the crime.

4. In 1978-1979, Petitioner worked for his brother who was allegedly managing an enterprise related sports book.

5. In 1985, an individual who later became a government witness stole retail merchandise in Pennsylvania and transported it across state lines to New York where it was sold by enterprise members. Petitioner allegedly accompanied the individual while the goods were being sold and transported.

The jury trial began on May 17, 1990. The government's evidence on each of the

alleged racketeering acts consisted of the following:

1. The informant testified that in 1973, Petitioner and a co-defendant had hired him and another individual to beat and rob two local bookmakers. The informant performed the robbery and gave a portion of the proceeds to Petitioner and the co-defendant. The informant further testified that he had heard various explanations for the crime, including a claim that the victims had been robbed and beaten to discourage them from talking to the FBI. (Orig. Trial Transcript, 79-92; App. 5a-6a)

2. Another witness testified that he was a burglar who had frequently borrowed money from an enterprise member to finance the expenses of his burglary operation. In 1974 or 1975, Petitioner and a co-defendant approached the witness and told him that

the lender wanted his money. The witness stated that he would pay the money to the lender, and Petitioner and the co-defendant left scratching their heads. The witness repaid the money the next day. (Orig. Trial Transcript, 175-180)

3. Testimony by various individuals described the background of the 1976 murder and Petitioner's alleged participation in that crime. Petitioner had been investigated by State authorities, but he was not charged. A co-defendant in the instant case and one of the actual trigger men had pleaded guilty in New York State court and had served approximately two years for the crime. (Orig. Trial Transcript, 101-393; App. 6a-8a)

4. The informer testified that he had worked for a sports book located in Utica during 1978 and 1979 and that Petitioner had also worked there. Evidence

was also introduced establishing that Petitioner had been convicted for gambling in a New York court as a result of his participation in the sports book. (Original Trial Transcript, 108-112)

5. The informer testified that in 1985 he had traveled to Pennsylvania and stolen retail merchandise which he transported back to New York, intending to resell the merchandise to an enterprise member in New York. The informer further testified that Petitioner had accompanied him while the merchandise was stolen. Inserra was acquitted of this count.

By the early 1980's, co-defendant Jack Minicone had become a powerful figure in the enterprise. Petitioner and Minicone had a falling out, and a violent argument ensued. Minicone shot gunned Petitioner's house. The enterprise leader allegedly sought to patch things up, but neither

Petitioner nor Minicone ever resolved their differences. (Original Trial Transcript 132-141). Other than the alleged 1985 incident, Petitioner's relationship with the enterprise was virtually non-existent. Indeed, although 748 enterprise related conversations were recorded during an investigation which began in 1985, Petitioner only appeared on tape once. In that conversation, Petitioner complained about his legal problems and told another individual that he had heard that the government was investigating the enterprise leader and his son. (Original Trial Transcript, 382-383) The tapes included a few references to Petitioner. In one reference, two individuals discussed a request for ammunition that was not honored. In another reference, the comment was made that Petitioner was trustworthy. (31a-32a)

Petitioner successfully moved to have the substantive RICO count dismissed on statute of limitations grounds. On June 26, 1990, the jury acquitted Petitioner of the conspiracy to transport stolen goods and of the RICO predicate act relating to stolen goods. The jury convicted Petitioner of RICO conspiracy.

Because the enterprise had continued operations until 1989, sentencing was pursuant to the United States Sentencing Guidelines. The probation officer's computation based the guidelines on a single overt act in furtherance of the conspiracy, the 1976 murder. As a result, Petitioner's guidelines exceeded the statutory maximum and converted the penalty for RICO conspiracy into a twenty year mandatory sentence. Petitioner vigorously objected, claiming, among other things, that it was a violation of the ex post

facto clause of the Constitution to sentence him based upon a 1976 overt act. Petitioner also objected because the murder was not used to figure the guidelines of a co-defendant who was an actual triggerman, because that individual had received a short state sentence for the crime.

Petitioner's objections were overruled, and he was sentenced to twenty years incarceration. Petitioner is presently serving his sentence.

Petitioner appealed his conviction and sentence to the United States Court of Appeals for the Second Circuit. Among other things, Petitioner argued that the evidence was insufficient on the 1973, 1974, and 1979 predicate acts. Petitioner also argued that because there were only two racketeering acts, the government did not establish the requisite pattern of racketeering activity. Alternatively,

Petitioner argued that the alleged acts of debt collection was insufficient on the facts of this case to satisfy the statutory requirements. Petitioner also argued withdrawal, claiming that his argument with Minicone and his completely minimal relationship with the enterprise after 1979, meant that he was no longer associated with the conspiracy. Petitioner also claimed that his twenty year sentence was a violation of the ex post facto clause of the Constitution because it was based upon a 1976 overt act, rather than upon some type of continuing activity which straddled the effective date of the Sentencing Guidelines.

On January 23, 1992, the United States Court of Appeals for the Second Circuit affirmed Petitioner's conviction and sentence in every respect. (1a) The Court held that the two predicate racketeering

acts were sufficient and that there was also sufficient evidence to support the jury's decision that Petitioner had not withdrawn from the conspiracy. The Court also upheld the sentence, although it did not specifically discuss Petitioner's contention that the guidelines were unconstitutionally applied to him. (45a)

Petitioner filed a timely Motion for Reconsideration and a Suggestion for Rehearing in banc. The reconsideration motion argued that the use of a 1976 overt act to sentence him violated the Constitutional prohibition against ex post facto laws, that there was no evidence linking one of the two racketeering predicates to the enterprise, that even if there was such evidence, there was no evidence establishing continuity, and that if the Court agreed and found only one predicate act of racketeering, the alleged

debt collections were insufficient as a matter of law to support his RICO conspiracy conviction.

On April 30, 1992, the Court granted the Motion for Reconsideration in part and amended the original opinion. (47a, 49a) The amendment addressed the ex post facto question and held that it was permissible to use a pre-guideline overt act to establish the guideline penalty. The Court analogized the guideline application to the use of recidivist statutes to increase a penalty, approved by this Court in Gryger v. Burke, 334 U.S. 728, 732 (1948). The Court concluded that there was fair notice of the penalty and that the conversion of an indeterminate sentence into a mandatory sentence was no different than enacting a recidivist statute which penalized an individual more severely for a current offense because of a crime committed

sometime in the past. The Court did not address the other aspects of the reconsideration petition and did not grant Petitioner's request for a rehearing in banc. (49a to 53a)

REASONS FOR GRANTING WRIT

Petitioner submits that the instant case raises two important questions of federal law. The ex post facto question is unique on its facts and has not been settled by this Court. The pattern of racketeering activity/debt collection question affords the Court an opportunity to provide the lower courts further guidance about the meaning, scope, and application of this Court's decision in H. J. Inc. v. Northwestern Telephone Co., 492 U.S. 229 (1989).

A. THE EX POST FACTO QUESTION

Petitioner was an active member of the

RICO conspiracy between 1973 and 1979. In 1976, Petitioner participated in a murder. Because of a dispute between himself and a powerful member of the conspiracy, he was basically inactive between 1979 and the end of the conspiracy in 1989.

The penalty in 1979 for RICO conspiracy was an indeterminate sentence of 20 years. In 1991, when Petitioner was sentenced, the statutory maximum penalty for conspiracy remained at 20 years, but the actual sentence was determined by the United States Sentencing Guidelines. The Second Circuit's application of those guidelines resulted in a mandatory 20 year sentence. Had Petitioner been sentenced for the continuing acts of the conspiracy rather than for the this ancient overt act, his guideline range would have been considerably less. Co-conspirators similarly situated received between 30 and

78 months, as opposed to the 240 months imposed upon Petitioner.

The general ex post facto principles are well established. The ex post facto clause prohibits the retrospective application of criminal laws that materially disadvantage the defendant. United States Constitution, Art. 1, § 9, cl.3; Art. 1, § 10, cl. 1.

The purpose of the ex post facto clauses was to prevent legislatures from enacting vindictive or arbitrary laws. Calder v. Bull, 3 Dall. 386, 389 (1798). They were also designed to give a defendant fair notice of the penalties which applied to his conduct. Calder, 3 Dall. at 388; Weaver v. Graham, 450 U.S. 24, 30 (1981).

This Court has fashioned a three prong test for determining whether legislation violates the ex post facto clause:

1. The legislation must be penal or

criminal in nature. Harisades v. Shaughnessy, 342 U.S. 580 (1952).

2. The legislation must be retrospective. Miller v. Florida, 482 U.S. 423 (1987).

3. The legislation must "disadvantage the offender affected by it." Miller, quoting Weaver v. Graham, 450 U.S. 24, 30 (1981).

This Court's most recent consideration of a sentencing guideline and the interplay between that guideline and the ex post facto clause was Miller v. Florida, 482 U.S. 423 (1987). In Miller, Florida's sentencing guidelines were revised after the crime was committed. The new guidelines dictated a harsher sentence than would have been imposed at the time that the offense was committed. Miller argued that it was a violation of the ex post facto clause to use the newer guidelines to

sentence him.

This Court agreed. The Court noted that a law is retrospective when it changes the legal consequences of acts completed before its effective date, citing Weaver v. Graham, 450 U.S. at p. 29. Moreover, Miller was not warned. All he knew was that the law could be changed in the future. He did now know that Florida would eventually attempt to subject him to a harsher penalty. Notice of a possible future change, a fact which applies to all criminal laws, is not enough to pass Constitutional muster. 423 U.S. at p. 431-432. See, also, Lindsey v. Washington, 301 U.S. 397 (1937) (the statutory penalty at the time of the offense was an indeterminate sentence between six months and fifteen years; at sentencing, it was a mandatory fifteen years which was the sentence imposed. The sentence was struck

down as ex post facto).

Finally, the new guidelines were more onerous because Miller's penalty was increased. 428 U.S. at pp. 433-434.

For all of these reasons, the harsher sentence was set aside and the case was remanded for re-sentencing in accordance with the Court's opinion.

Petitioner submits that the Second Circuit opinion is directly contrary to the Miller and Lindsey decisions, and that this fact, combined with the terrible injustice done Petitioner, justifies the writ sought.

In the instant case, the application of the sentencing guidelines to petitioner was retrospective because it clearly changed the consequences of acts completed before the Guideline's effective date. Had Petitioner been indicted and convicted at anytime prior to November of 1987, he would have been subject to an indeterminate

sentence of zero to twenty years. The consequence of his indictment after November of 1987 was that his penalty had become a mandatory 20 years. Accordingly, as in Miller, the change was retrospective.

Petitioner also had no warning that the penalty would be changed. As in Miller, he knew that legislative changes were always possible, but he had absolutely no notice that the law would change in 1987 and that his exposure would change drastically. There is another factor. Petitioner was essentially inactive in the conspiracy after 1979. Had he had notice, he could have taken additional steps to withdraw from the conspiracy and to eliminate the increased exposure which the guideline enactment brought. Accordingly, the lack of notice caused petitioner identifiable harm.

Finally, it is clear that a twenty

year mandatory sentence is more onerous than an indeterminate zero to twenty year sentence. Cf., Lindsey v. Washington, 301 U.S. 397 (1937). See, also, United States v. Bolinger, 940 F.2d 478 (9th Cir. 1991); United States v. Landlaw, 733 F.Supp. 1256 (N.D. Ind. 1990); United States v. Vastelica, 751 F.Supp. 803 (E.D. Ark. 1990) (all of which hold that a change in the guidelines which increase the sentencing guideline offense level is a more onerous sentence for purposes of an ex post facto analysis).

For all of these reasons, the Second Circuit has misapplied Miller, and certiorari is justified.

The Second Circuit also misapplied Gryger v. Burke, 334 U.S. 728 (1948) and that fact is an additional reason to grant review of petitioner's case.

In Gryger, the defendant was sentenced

under a State Habitual offender law. One of the factors in the sentencing calculation were convictions which pre-dated the current offense. The defendant challenged the sentencing scheme under ex post facto principles. This Court found no violation because the effect of the state's law was only to increase the penalty for the current crime, not penalize the defendant for his past criminal acts. See, also, McDonald v. Massachusetts, 180 U.S. 311 (1901) (increasing penalty for current offense does not violate the ex post facto clauses when the punishment is for the new crime only).

The Circuits have generally applied Gryger when considering challenges to the criminal history component of the guideline calculation. Those cases have held that it is not ex post facto to increase the criminal history score and thus the penalty

for the instant offense because of the defendant's prior history. See, e.g., United States v. Mettler, 938 F.2d 764 (7th Cir. 1991) and United States v. Carey, 943 F.2d 44 (11th Cir. 1991).

The Second Circuit's application, however, was a substantial departure from other Circuits and this Court's own analysis. The Second Circuit, in its amended opinion, explicitly acknowledged that Petitioner's sentence was determined solely by pre-guideline conduct. However, the Court justified that result by noting that recidivist statutes do not violate the ex post facto clause. The Court held that, like the recidivist statutes, petitioner had fair notice and that no violation occurred because of that notice.

The flaw in the Second Circuit's reasoning is that the recidivist cases deal with imposing a harsher penalty for the

current offense because of a defendant's past criminal acts. Petitioner's case deals with a harsher penalty for the current crime because the penalty for an overt act charged as part of the instant crime was increased. The two situations are totally disparate, and the Second Circuit's reasoning is plainly incorrect.

A third reason to grant the writ is the continuing difficulties which the Circuits are having in applying ex post facto rules to the Guidelines. This Courtcould provide much needed guidance by accepting this case for review. Examples of these problems include the following:

1. Do the guidelines generally apply to a continuing conspiracy which straddles the effective date of the Sentencing Guidelines. The Circuit Courts have generally said "yes", but this issue has not been considered by this Honorable

Court. The issue is clearly part of petitioner's case, because the conspiracy began in 1973 and continued until 1989. See, e.g., United States v. Story, 891 F.2d 988 (2d Cir. 1989); United States v. Watford, 894 F.2d 665 (4th Cir. 1990); United States v. White, 869 F.2d 822 (5th Cir.), cert. denied, 490 U.S. 1112 (1989); United States v. Tharp, 892 F.2d 691 (8th Cir. 1989); United States v. Williams, 897 F.2d 1034 (10th Cir. 1990); United States v. Pippin, 903 F.2d 1478 (11th Cir. 1990); Sentencing Guidelines Commission, "Questions Most Frequently Asked About the Sentencing Guidelines", March 1990, Questions 41, 51.

2. Do the Guidelines apply if the defendant commits no overt acts in furtherance of the conspiracy after the Guideline's effective date? The Circuits have generally answered "yes". This issue

clearly applies to petitioner because he committed no criminal acts relating to the conspiracy after November 1, 1987. See, e.g., United States v. Chambers, 944 F.2d 1253 (6th Cir. 1991); United States v. Canino, 949 F.2d 928 (7th Cir. 1991); United States v. Inafuku, 938 F.2d 972 (9th Cir. 1991). The Fourth Circuit reached a contrary conclusion in United States v. Bakker, 925 F.2d 728 (4th Cir. 1991).

3. If the penalty for a conspiracy increases during the lifetime of the conspiracy, is it ex post facto to apply the higher penalty? Most Circuits have answered "yes", although no Court had previously addressed the question raised in this case as to whether the same rule applies when the penalty for the conspiracy remains the same, but the penalty for an overt act in furtherance of the conspiracy changes and that change drives the sentence

for the overall conspiracy. See, e.g., United States v. Borelli, 336 F.2d 376 (2d Cir. 1964), cert. denied, 379 U.S. 960 (1965); United States v. Sheffer, 896 F.2d 842 (4th Cir.), cert. denied, 111 S.Ct. 432 (1990; United States v. White, 869 F.2d 822 (5th Cir.), cert. denied, 490 U.S. 1112 (1989); United States v. Inafuku, 938 F.2d 972 (9th Cir. 1991).

4. - Is it a violation of the ex post facto clause if an amendment to the guidelines makes the punishment at the time of sentencing greater than the punishment at the time the offense was committed. The Circuits have generally answered "yes". It is difficult to discern why this analysis did not apply to Petitioner's case and why the Second Circuit's decision is not in conflict with the approach taken by that Circuit and other Circuits in this particular situation. See, e.g., United

States v. Molina, 952 F.2d 514 (D.C. Cir. 1992); United States v. Green, 952 F.2d 414 (D.C. Cir. 1991); United States v. Lam Kwong Wah, 924 F.2d 298 (D.C. Cir. 1991); United States v. Harotunian, 920 F.2d 1040 (1st Cir. 1990); United States v. Adeniyi, 912 F.2d 615 (2d Cir. 1990); United States v. McAllister, 927 F.2d 136 (3d Cir.), cert. denied, 112 S.Ct. 111 (1991); United States v. Morrow, 924 F.2d 779 (4th Cir. 1991); United States v. Swanger, 919 F.2d 94 (8th Cir. 1990); United States v. Saucedo, 950 F.2d 1508 (10th Cir. 1991); United States v. Worthy, 915 F.2d 1514 (11th Cir. 1990).

5. When does a defendant withdraw making it ex post facto to apply increased conspiratorial penalties to him? While most Circuits are in agreement about the general principles, the application of those principles to particular cases has

divided the Circuits. This issue is also plainly present in Petitioner's case. See, e.g., United States v. Bodre, 948 F.2d 28 (1st Cir. 1991); United States v. Juodakis, 834 F.2d 1099 (1st Cir. 1987); United States v. Nerlinger, 862 F.2d 967 (2d Cir. 1988); United States v. Steele, 685 F.2d 793 (3d Cir.), cert. denied, 459 U.S. 908 (1982).

This Court has not really definitively addressed the issue in quite some time, and it would be appropriate to grant certiorari to clarify the issue for the Circuit Courts. See, e.g., United States v. United States Gypsum Co., 438 U.S. 422 (1979); Hyde v. United States, 225 U.S. 347 (1912).

All of these reasons justify consideration of the ex post facto claim.

B. THE PATTERN QUESTION

In H. J. Inc. v. Northwestern Telephone Co., 492 U.S. 229 (1989), this

Court redefined the meaning of "a pattern of racketeering activity" as that term is used in 18 U.S.C. § 1961 (5). Among other things, this court held that proof of two acts of racketeering alone were insufficient to support either a criminal or civil RICO claim. In addition to at least two acts, there must also be a "factor of continuity plus relationship which combines to produce a pattern." 492 U.S. at 239. Continuity can be shown either by a closed or open ended analysis. Id. In a closed end analysis, there is no risk of future illegal conduct, and a Court must be able to identify "a series of related predicates extending over a substantial period of time." Id. In an open ended analysis, the Court looks not only at the facts before it, but at whether there is a threat of continued wrongful, future activity. 429 U.S. at 241.

Relatedness requires a consideration of whether there really was a pattern or whether there was a series of separate, isolated, or disconnected events. The latter finding indicates the type of sporadic activity which prevents a determination that the requisite pattern is present. 492 U.S. at 240. See, also, Sedima S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 (1985). This Court also noted that these principles were fact specific and that "the development of these concepts must await future cases." 492 U.S. at 242-243.

Petitioner's RICO conviction was based upon two racketeering acts. One was a 1976 murder; the second was his involvement in a 1979 sports book. Petitioner claimed throughout that the initial pattern evaluation must be based upon his personal conduct rather than the conduct of others

and that these two widely separated and sporadic acts did not constitute a sufficient pattern under the H. J. case. Petitioner also claimed that the ten year crime free period following the 1979 sports book established that the acts were isolated. Moreover, since the conspiracy had ended, there was no issue of future continuity so that the analysis should have been conducted on a closed end basis.

This case raises a number of important issues, and those issues are an independent justification for the writ sought:

1. H. J. was a civil RICO case and, therefore, the case did not address problems peculiar to a criminal prosecution.

Several Circuits have interpreted H. J.'s pattern requirement far differently when the case involves a criminal enterprise. In those cases, the Courts

have held that unrelated acts may satisfy the relatedness requirement as long as those otherwise unrelated acts are related to the RICO enterprise. United States v. Angiulo, 897 F.2d 1169 (1st Cir.), cert denied, 111 S.Ct. 130 (1990); United States v. Indelicato, 865 F.2d 1370 (2d Cir.) (en banc), cert. denied, 107 L.Ed. 2d 24 (1989); United States v. Eufrasio, 935 F.2d 553 (3d Cir. 1991).

This approach is an important exception to the H. J. rule. Moreover, the exception has an extremely harsh impact on a relatively minor player such as Petitioner because the exception virtually washes away the pattern requirement. The Second Circuit has, in fact, substituted a rule which states that two acts, without more, are always equivalent to a pattern when the enterprise is an association of criminals. This is an important

modification to the H.J. rule which has far reaching implications. It is thus a modification which definitely deserves this Court's close attention.

2. The criminal enterprise cases do not deal with the continuity question in a case such as this one where the enterprise has ended and where the defendant's total involvement in the enterprise consisted of two very ancient racketeering acts. The Second Circuit's erred because it interpreted H.J.'s continuity prong in an open ended fashion rather than a closed end fashion. This mistake resulted in a substantial miscarriage of justice, which only this Court can correct.

It is Petitioner's position that since the enterprise was out of business, there was no risk of future activity. Accordingly, when petitioner's conduct is viewed against the total conduct of the

enterprise, his personal involvement was minor, sporadic, and disconnected. Accordingly, under H.J., the Second Circuit should have concluded that his personal activity did not constitute a RICO pattern.

3. In H. J., this Court made it clear that the principles it established were fact specific and that the parameters of the rules had to be developed by subsequent cases. 492 U.S. at 231.

The Courts have struggled with the pattern rules, and a reading of the cases makes it obvious that there is no uniform or clear set of principles that have evolved. See, e.g., Miranda v. Ponce Federal Bank, 948 F.2d 41 (1st Cir. 1991); Hughes v. Conso-Pennsylvania Coal Co., 945 F.2d 594 (3d Cir. 1991); Brubaker v. City of Richmond, 943 F.2d 1363 (4th Cir. 1991); Calcasieu Marine Nat. Bank v. Grant, 943 F.2d 1453 (5th Cir. 1991); Thompson v.

Paasche, 950 F.2d 306 (6th Cir. 1991); J. D. Marshall Intern. v. Redstart, Inc., 935 F.2d 815 (7th Cir. 1991); Lange v. Hocker, 940 F.2d 359 (8th Cir. 1991); Bacchus Industries, Inc. v. Arvin Industries, 939 F.2d 891 (10th Cir. 1991); United States v. Kotvas, 941 F.2d 1141 (11th Cir. 1991); Pyramid Securities, Ltd. v. IB Resolution, Inc., 924 F.2d 34 (1st Cir. 1991).

These cases are only examples of the difficulties which the Circuits are having. They point out the benefit of further guidance from this Court.

C. THE DEBT COLLECTION ISSUE

18 U.S.C. § 1961 (6) provides that a RICO conviction may be based upon the collection of an unlawful debt. In addition to the two racketeering acts, Petitioner had been charged and convicted for two other acts. In the lower courts, Petitioner argued that these acts did not

constitute debt collections and that even if they did, one or two debt collections without more should not suffice to support a conviction. Among other things, Petitioner argued that it was inconceivable that the pattern requirement would have so many qualifications, but that the debt collection requirement would have none.

This issue was not reached by the Second Circuit because the Court decided the racketeering pattern question against Petitioner. However, should this Court find for Petitioner on the pattern argument, the debt collection issue is relevant, if only to give guidance upon remand.

The debt collection issue is not well developed. Petitioner has only located three cases which address the issue. In United States v. Pepe, 747 F.2d 632, 645 (11th Cir. 1984), the Court noted in

passing that one debt collection episode would support a RICO conviction. There was no analysis of the question. In United States v. Vastola, 899 F.2d 211, 228 n.21 (3d Cir. 1990), the Court cited Pepe and stated, again without analysis, that a single debt collection was sufficient. Finally, in United States v. Giovanelli, 945 F.2d 479, 490-491 (2d Cir. 1991), the Second Circuit in a case involving three debt collections cited Pepe and Vastola and held that a single debt collection, even without more, would be sufficient.

While debt collection cases are obviously less frequent than racketeering cases, the principle invoked is an important one, and deserves this Court's consideration.

RICO is a harsh statute which imposes draconian criminal and civil penalties. It is intuitively bizarre that Congress could

have intended such a complicated definition of a racketeering pattern and, at the same time, permitted the imposition of RICO penalties upon a criminal or civil defendant who was involved in but a single debt transaction.

Petitioner's case also illustrates the point. Petitioner vigorously disputed the alleged debt collections. Specifically, as to the 1973 debt collection, he argued that there insufficient evidence to establish that this event was a collection of debt as opposed to some other distinct type of criminal conduct.

Petitioner and a co-defendant hired two men to beat and rob two Utica bookmakers. The informant and only government witness testified that he had heard several explanations for the beating. One explanation was that the enterprise leaders had been hired by third parties to

administer the beating because the victims owed money to these third party individuals. Another explanation was that the victims were beaten and robbed to persuade them not to talk with the FBI. The informant further testified that he didn't know which explanation was correct. Accordingly, the evidence was completely unclear as to whether the beating related to a debt collection or to some other indepenent purpose. Accordingly, even if the RICO analysis focussed upon debt collections rather than pattern, this 1973 event should arguably not have been considered when determining whether the RICO prerequisites had been met.

As to the 1974 or 1975 transaction, trial evidence made clear that Petitioner did not make the loan and that he did not collect any money. His sole participation in the debt transaction was to pass along a

message that the enterprise leader wanted his money. When the debtor told Petitioner that he would pay the enterprise leader directly, Petitioner left scratchint his head. It is simply inconceivable that this is the type of activity which Congress envisioned when it passed the RICO statute. It is equally inconceivable that this type of activity could be the sole basis for a mandatory twenty year sentence following a RICO conviction.

Clarification is required, and the need for this clarification justifies issuance of the writ.

CONCLUSION

WHEREFORE, Petitioner respectfully prays that this Court grant certiorari and issue a definitive pronouncement on the use of a pre-guideline overt act to establish a guideline sentence and a clarification on

the statutory pre-requisites to a RICO offense. Such a decision would resolve conflicting decisions between the Federal Courts as well as to clarify two issues of significant jurisprudential significance. Petitioner respectfully prays that this Court grant plenary review, reverse the decision of the United States Court of Appeals for the Second Circuit and hold that the use of two non-continuous racketeering acts or one debt collection is insufficient to support a conviction for RICO conspiracy. Alternatively, Petitioner prays that the Court vacate his sentence and direct that he be re-sentenced using factors other than the 1976 murder to establish his guideline range.

July 28, 1992 Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

January 23, 1992

Docket Nos. 91-1014, -1015, -1018, -1020, --1062, -1319, -1334

UNITED STATES OF AMERICA,

Appellee

v.

JACK J. MINICONE, JR., also known as Jake, JACK ZOGBY, also known as Turk, ANTHONY J. INSERRA, BENEDETTO CARCONE, also known as Benny, RUSSELL E. CARCONE,

Appellants

Before:

TIMBERS, MINER, and ALTIMARI, Circuit Judges

On appeals from judgments of conviction entered after a jury trial in the Northern District of New York, Howard G. Munson, District Judge

Affirmed in part; vacated and remanded in part.

TIMBERS, CIRCUIT JUDGE

Appellants Jack J. Minicone, Jr., Jack Zogby, Russell E. Carcone, and Benedetto Carcone appeal from judgments entered December 28, 1990 and January 2, 1991 after a jury trial in the Northern District of New York, Howard G. Munson, District Judge, convicting them of conducting the affairs of an enterprise through a pattern of racketeering activity in violation of 18 U.S.C § 1962 (c) (1988), and of conspiring to conduct and participate in the affairs of an enterprise in violation of 18 U.S.C. § 1962 (d) (1988). Appellant Anthony J. Inserra appeals from a judgment entered January 2, 1991, convicting him of conspiring to conduct and participate in the affairs of an enterprise in violation of 18 U.S.C. § 1962 (d). Zogby also appeals from the judgment entered January 2, 1991, convicting him of conspiring to receive and transport stolen property in

violation of 18 U.S.C. § 371.

Appellants' chief contentions on appeal are that there was insufficient evidence to support their convictions; that the district court erred in instructing the jury; that the district erred in not declaring a mistrial; and that the district court erred in sentencing them. The government cross-appeals, contending that the district court erred in applying the Sentencing Guidelines.

We affirm the convictions and sentences of all appellants, except that we vacate Minicone's sentence and remand his case to the district court for the limited purpose of resentencing him in accordance with the Sentencing Guidelines.

I.

We shall summarize only those facts and prior proceedings believed necessary to an understanding of the issues raised on

appeal.

Following a jury trial, Minicone, Zogby, Benedetto Carcone and Russell Carcone were convicted of conducting the affairs of an enterprise through a pattern of racketeering activity (RICO), in violation of § 1962 (c). They and Inserra were also convicted of conspiring to conduct and participate in the affairs of an enterprise through a pattern of racketeering activity (RICO conspiracy), in violation of § 1962 (d). Zogby was convicted of conspiring to receive and transport stolen property, in violation of § 371.

Appellants' convictions stemmed from their alleged involvement in a wide-ranging criminal enterprise that profited from extortion, loansharking, illegal gambling, and trafficking in stolen property during the period from approximately 1973 to 1989.

The alleged enterprise was centered in Utica, New York. It was run by unindicted co-conspirators Anthony Falange and Angelo Conte; both Falange and Conte died before the indictment in this case was returned. Cooperating witnesses Dennis Pritchard and Michael Andrello also participated in the enterprise.

The following is a brief account of the appellants' principal activities as disclosed by the evidence at trial.

(A)

In 1973, Minicone and Inserra asked Pritchard to "do a score" on two local bookmakers, Philip and Frank DeFazio, after Falange and conte had been approached by two individuals who were owed money by the DeFazios. Pritchard and another man proceeded to rough up the DeFazios and stole.$8,000 in cash from them, $800-$900 of which they gave to Minicone and Inserra.

Minicone and Inserra did not "do the score" themselves because they feared they would be recognize by the DeFazios.

(B)

In 1976, Minicone, Zogby , and Inserra decided to kill Al Marrone shortly after his release from prison because they feared that Marrone wanted to kill Falange, and possibly them as well. They feared also that Marrone wanted to take over their territory. Minicone, Zogby, and Inserra began planning Marrone's murder six months beforehand. They initially contemplated paying $10,000 to an inmate at the penitentiary where Marrone was incarcerated. They rejected that idea, however, and proceeded to interview several other potential "hitmen". Ultimately, they hired Edward Noel, who had spent time in prison with Zogby, to help them kill Marrone. Inserra, Minicone, Zogby, and

Pritchard met with Noel in the early fall 1976 in a restaurant in Utica to plan the murder. In late September, Inserra and the others showed Noel one of the weapons to be used on Marrone, a semi-automatic rifle with field scope. Two to three weeks before Marrone's murder, Minicone asked to borrow Pritchard's .38 caliber pistol because he believed his own handgun might not be powerful enough to protect him in the event Marrone decided to strike first.

On the night of October 2, 1976, while Minicone and Inserra kept their distance and monitored a police scanner, Noel, Zogby, and another man shot Marrone dead on the sidewalk in front of his girlfriend's home.

Minicone and Inserra were indicted for Marrone's murder. The indictments were dismissed because Noel was a fugitive at the time, and the state did not have the

non-accomplice corroboration required by New York law. The state accepted a plea from Zogby to a lesser charge of soliciting murder, since Pritchard was not available to testify at that time. Zogby later confessed to his participation in the murder when talking with District Attorney Investigator Robert Graziano in Utica. Zogby claimed, however, that he had not fired the shots that killed Marrone.

(C)

On October 23, 1983, Thomas Bretti was injured when a bomb on the steps of his home exploded as he approached. The bomb had been made by government witness Andrello. It was planted by Minicone who had been assigned a contract on Bretti's life by Anthony Falange. Bretti had stopped paying some Utica bookmakers and had gotten into heated arguments with Falange and Louis Brindisi, Falange's

attorney.

(D)

Appellants engaged regularly in the extortion of local bookmakers. Inserra once stated to Pritchard that "[t]he way we collect money is we scare people, we put fear in them, we rough them up. We have to use violence, but as long as they are scared, they will pay." The ubiquitous Carl Mazza helped insure that the bookmakers did not fall too far behind in their payments. Local bookmakers were forced to make regular stops at Benny's Swap Shop at 512 Albany Street, Utica, a headquarters of appellants, in order to make their monthly "protection payment".

George "Butch" Sandouk, a longtime Utica bookmaker, regularly stopped by Benny's Swap Shop to make protection payments to the enterprise. On numerous occasions he was observed delivering the

payments to Benede4tto Carcone, Russell Carcone, and Minicone. On January 12, 1988, prior to Sandouk's arrival at the Swap Shop, Benedetto Carcone informed Minicone that Sandouk was "like clockwork." When Sandouk arrived, Minicone and Benedetto Carcone discussed requiring Sandouk to pay extra during the basketball season:

> "Carcone: Hey, how are you Butch?
>
> Minicone: ...[D]id he tell you about the baskets?
>
> Sandouk: What baskets?
>
> Minicone: You have to pay for the baskets, the baskets.
>
> Sandouk: Yeah.
>
> Minicone: Alright
>
> * * *
>
> Sandouk: Yeah...alright...this is towards
>
> Minicone: Yours is twenty-five because your [sic] small right?
>
> Sandouk: Yeah, I know.

> Carcone: And you don't have to ride around saying anything to anybody that your [sic] paying this thing.
>
> Minicone: No, he knows better, he had his first time...he knows better.
>
> Carcone: Yeah.
>
> Sandouk: Okay.
>
> * * *
>
> Carcone: If anybody asks you, you're doing the same as you were...did before.
>
> Sandouk: Nobody knows nothing, I don't say nothing."

George "Hoppy" Tamer operated a bookmaking operation out of Utica for many years. He also ran a card game that allowed him to take a cut out of the pot. Around 1983, Tamer was approached by Anthony Falange, who told him to make payments of $50-per-week so he "wouldn't have any problems". In approximately 1986 or 1987, at the request of Falange, Tamer began making the payments to Benedetto

Carcone. Tamer usually sent his brother-in-law, Hiklel Yaghy, to make the payments. Yaghy would deliver the payments to Carcone at the Swap Shop at 512 Albany Street. Tamer also made occasional payments to Minicone. On one occasion, Tamer paid Minicone when he was seated at a bar with Inserra and Pritchard. After Tamer walked away, Minicone said, "This is a joke. Its like taking candy from a baby with these people. Keep them scared, they keep paying. They even find us." Inserra agreed.

(E)

Pritchard and Inserra participated in a bookmaking operation during 1978-1979. Inserra later was convicted and fined on charges relating to that operation. Pritchard assisted Inserra in collecting and paying off bets. Minicone also took and collected bets.

(F)

Benedetto and Russell Carcone, along with two other individuals, conducted a football parlay sheet operation out of 512 Albany Street between November 1987 and April 1988. They were not successful in the endeavor. Benedetto Carcone once commented to Falange that "I'm the only f---ing bookmaker in town that's losing money in these f---ing things."

(G)

Zogby engaged in the fencing of stolen property, much of which was supplied by government witness Pritchard. Pritchard also sold stolen goods to Falange and Benedetto Carcone, who resold the goods from their respective Swap Shops. Pritchard and others would obtain merchandise on shoplifting or "boosting" trips throughout the Northeast. Zogby became anxious when he learned that

Pritchard had begun cooperating with the government; he commented "They got me with interstate transportation...."

(H)

Appellants were also active in loansharking. In a conversation recorded in October 1986, Inserra commented to Pritchard that "Benny's in charge of the loansharking", and [y]ou pay 10% a week or month, or whatever the hell it is, interest." Pritchard and Andrello both borrowed money at usurious rates to finance their burglary and financing ventures. Once, when Andrello fell behind in his payments, Minicone and Inserra paid him a visit to tell him that "Ange [Conte] wants that money...." Andrello told them he would pay Conte in person. He did so the next day.

In December 1987, Minicone brought

Salvatore Spina to 512 Albany Street to discuss borrowing $2,500 for six months. Benedetto Carcone told him that the interest rate would be 2 points a week -- 10 points a month." Later that day, Carcone told Falange about the individual who wanted to borrow money, saying that Minicone had okayed it. When Spina later was arrested and could no longer make the payments, Minicone indicated to Carcone that he himself would have to make good on the loans since he had vouched to Falange for Spina.

(I)

When appellants learned of the government's investigation involving them and of the cooperation of Pritchard and Andrello, they discussed the matter amongst themselves with grave concern. Minicone commented to Benedetto Carcone, "You know how many people are going to jail? he was

wired two f---ing years." They planned to kill Pritchard, but they were frustrated because security around Pritchard was too tight and they could not get close enough to kill him.

(J)

Following a jury trial, appellants were convicted of the offenses set forth in the first paragraph of this opinion.

Minicone was sentenced to a total of 391 months imprisonment and 3 years of supervised release. Inserra was sentenced to a total of 240 months imprisonment and 3 years of supervised release. Zogby was sentenced to a total of 78 months imprisonment and 3 years of supervised release. Benedetto Carcone was sentenced to a total of 30 months imprisonment and 2 years of supervised release. Russell Carcone was sentenced to a total of 18 months imprisonment and 2 years of

supervised release. Each of the appellants appeal. The government cross appeals the sentences of Minicone, Zogby, Russell Carcone, and Benedetto Carcone.

For the reasons set forth below, we affirm the convictions and sentences of all appellants, except we vacate Minicone's sentence and remand his case for the limited purpose of resentencing him in accordance with the Sentencing Guidelines.

II.

(A)

Inserra, Zogby, Benedetto Carcone and Russell Carcone contend that the evidence against them was insufficient as a matter of law to support their convictions. When reviewing such claims, we view the evidence in the light most favorable to the government, United States v. Stanley, 928 F.2d 575, 576 (2 Cir.), cert. denied, 112 S.Ct 1141 (1991), drawing all reasonable

inferences and resolving all issues of credibility in favor of the verdict. United States v. Macklin, 927 F.2d 1272, 1277 (2 Cir.), cert. denied, 112 S.Ct. 146 (1991).

Zogby and Russell Carcone contend that the evidence was insufficient to support their substantive RICO convictions. Zogby concedes that there was sufficient evidence to support the jury's finding that he committed the predicate acts which charged the Marrone murder and receiving and transporting stolen property, but he contends that these crimes were unrelated to any enterprise and did not constitute a pattern of racketeering.

Similarly, Russell Carcone contends that the two predicate acts for which he was charged -- the extortion of George Sandouk and the conduct of the football parley operation -- did not amount to

participation in the affairs of an enterprise through a pattern of racketeering. Benedetto Carcone makes the same argument with respect to the predicate acts for which he was charged -- bookmaking, multiple acts of extortion of bookmakers -- and two acts of illegal debt collection.

Proof of a RICO violation pursuant to § 1962 (c) requires a showing that an "enterprise" engaged in a "pattern" of racketeering activity. An enterprise is "a group of persons associated together for a common purpose of engaging in a course of conduct", and it "is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." United States v. Turkette, 452 U.S. 576, 583 (1981).

"[T]he pattern requirement should be

interpreted to prevent the application of RICO to perpetrators of 'isolated' or 'sporadic' criminal acts". United States v. Indelicato, 865 F.2d 1370, 1383 (2 Cir. 1989) (en banc). Two predicate acts will suffice to prove a pattern of racketeering, provided the prosecution also shows that "the racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity." H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 239 (1989) (emphasis in original).

The requirement of "relatedness" embodies two different concepts. The racketeering acts must be related to each other ("horizontal" relatedness), and they must be related to the enterprise ("vertical" relatedness). United States v. Long, 917 F.2d 691, 697 (2 Cir. 1990). Evidence of relatedness and continuity or the threat of continuity may arise from

facts external to the two predicate acts, United States v. Kaplan, 886 F.2d 536, 542 (2 Cir. 1989), cert. denied, 493 U.S. 1076 (1990); Indelicato, supra, 865 F.2d at 1383, including the nature of the RICO enterprise itself. Kaplan, supra, 886 F.2d at 542; Indelicato, supra, 865 F.2d at 1383. Two racketeering acts "are not directly related to each other may nevertheless be related indirectly because each is related to the RICO enterprise." Indelicato, supra, 865 F.2d at 1383. Moreover, "[w]here the enterprise is an entity whose business is racketeering activity, an act performed in furtherance of that business automatically carries with it the threat of continued racketeering activity." Id. at 1383-84; Unite States v. Coiro, 922 F.2d 1008, 1017 (2 Cir.), cert. denied, 111 S.Ct. 2826 (1992); Kaplan, supra, 886 F.2d at 542; see also, H. J.

Inc., supra, 492 U.S. at 242-243 ("[T]he threat of continuity is sufficient established where the predicates can be attributed to a defendant operating as part of a long-term association that exists for criminal purposes.")

The requisite nexus between the RICO enterprise and the predicate racketeering acts may be established by evidence that the defendant was "'enable to commit the predicate offenses solely by virtue of his position in the enterprise or involvement in or control over the affairs of the enterprise,'" or that "'the predicate offenses are related to the activities of that enterprise.'" United States v. Robilotto, 828 F.2d 940, 947-48 (2 Cir. 1987) (emphasis in original), cert. denied, 484 U.S. 1011 (1988) (quoting United States v. Scotto, 641 F.2d 47, 54 (2 Cir. 1980), cert. denied, 452 U.S. 961 (1981)).

Zogby contends that his involvement in the Marrone murder and his stolen property transactions were merely isolated dealings and that he was acting on his own personal behalf, not as a member of the enterprise. Although Marrone had threatened the lives of Inserra, Zogby, and Minicone, the threats stemmed from Marrone's plan to take over what he believed was his -- control of the operation in the Oneida County area. Moreover, Marrone's murder was perpetrated through the joint efforts of Zogby, Minicone, and Inserra. The record supports the jury's finding that the murder of Marrone was accomplished as part of the appellants' long-term association with the enterprise and was performed for the purpose of enriching the enterprise's members and consolidating its power. Indelicato, supra, 865 F.2d at 1383.

Likewise, there was sufficient

evidence to support the jury's finding that Zogby's conduct of the stolen goods operation was related to the conduct of the enterprise. Pritchard, a long-time associate of the enterprise, did the bulk of the shoplifting for Zogby. Pritchard also sold stolen property directly to Falange and Benedetto Carcone. Furthermore, Falange, Inserra, and Minicone loaned money to Pritchard to help finance his "boosting" trips. There was sufficient evidence to support the jury's finding that Zogby's participation in the stolen goods operation, together with his participation in the murder of Marrone, constituted a pattern of racketeering activity in furtherance of the enterprise's affairs.

The evidence of Benedetto Carcone's participation in multiple acts of extortion of local bookmakers and collection of unlawful debts provided ample basis for the

jury's finding that he had participated "directly or indirectly, in the conduct of [the] enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." § 1962 (c). Indeed, the extortion and debt collection activity engaged in by Benedetto Carcone, and by the enterprise in general, is at the heart of the conduct targeted by the RICO statute. H.J. Inc., supra, 492 U.S. at 245; Russello v. United States, 464 U.S. 16, 26 (1983); Turkette, supra, 452 U.S. at 591. Such acts of extortion and illegal debt collection inherently exude a "pattern" and a threat of continuing criminal activity.

The evidence indicates that Russell Carcone's participation in the affairs of the enterprise may have been less extensive than that of the other appellants. Nevertheless, the two racketeering acts with which he is charged -- participating

in a gambling operation and in the extortion of Sandouk -- support the jury's conclusion that he engaged in a pattern of racketeering in furtherance of the enterprise's affairs. Although Russell Carcone's acceptance of extortion payments from Sandouk, in violation of 18 U.S.C. § 1955, clearly was in furtherance of the enterprise's affairs, he contends that his RICO conviction should be reversed because the bookmaking operation was unrelated to the affairs of the enterprise. We hold that there was sufficient evidence for a jury to reasonably infer otherwise. Moreover, the evidence showed that Falange, the enterprise's boss, was aware of the bookmaking operation. In light of the enterprise's pervasive involvement in local bookmaking activities, the jury's finding that the bookmaking operation was sufficiently related to the affairs of the

enterprise will not be disturbed.

Although the relationship between Sandouk's extortion and the bookmaking operation, standing by themselves, appears tenuous, evidence external to the acts themselves establishes the requisite "pattern". Here, the enterprise itself provides the requisite nexus between Russell Carcone's participation in bookmaking and extortion. Kaplan, supra, 886 F.2d at 542; Indelicato, supra, 865 F.2d at 1383; United States v. Masters, 924 F.2d 1362, 1366 (7 Cir.), cert. denied, 111 S.Ct. 2019 (1991). Appellants constituted an informal organization for the common purpose of engaging in an ongoing course of criminal conduct, Turkette, supra, 452 U.S. at 583, including extortion, loansharking, illegal gambling, and trafficking in stolen property. Russell Carcone's participation in the bookmaking operation and the

extortion of Sandouk, on the specific facts of this case, demonstrate a pattern of racketeering activity.

Inserra contends that his involvement in the Marrone murder and in the gambling operation were isolated acts unrelated to the activities of the enterprise and therefore were insufficient to support the conspiracy charge against him. To prove a RICO conspiracy under § 1962 (d), the government must show that the defendant agreed to participate in two predicate racketeering acts and he knew that the general nature of the conspiracy extended beyond his individual role. United States v. Rastelli, 870 F.2d 822, 828 (2 Cir. 1989), cert. denied, 493 U.S. 982 (1989). As stated above, the Marrone murder suffices as a predicate act sufficiently related to the enterprise's activities. We are invited to hold, however, that the

sports book operation was not sufficiently related to the enterprise. We decline the invitation. The operation was run out of Inserra's house. Pritchard testifies that he participated in the sports book operation and that Minicone took bets over the telephone and helped collect money from the gamblers. Pritchard also testified that the gambling operation was run by Inserra's brother, Mook, and that Anthony Inserra worked for Mook.

As the government points out, it is inconceivable that Pritchard, Minicone, and Inserra could have been participating in the gambling operation without the enterprise also being involved. Indeed, as with Russell Carcone, Inserra's conviction is supported by evidence regarding the enterprise's pervasive involvement in local gambling. The jury reasonably could have found that the gambling operation and the

murder of Marrone "form[ed] a pattern defined by the purposes of the enterprise." Masters, supra, 924 F.2d at 1366. The question of whether acts form a pattern "rarely is a problem with a criminal enterprise, as distinct from a lawful enterprise that commits occasional criminal acts." Id.

(B)

Inserra contends that he withdrew from the conspiracy more than five years before the indictment was handed down in August 1989 and that the RICO conspiracy charge therefor was time-barred pursuant to 18 U.S.C. § 3282 (1988). To escape liability, Inserra would have to prove some act that affirmatively established that he disavowed his criminal association with the conspiracy, United States v. Borelli, 336 F.2d 376, 388 (2 Cir. 1964), cert. denied, 379 U.S. 960 (1965), and that he

communicated his withdrawal to his co-conspirators. Nerlinger, supra, 862 F.2d at 974. Here, Inserra bases his claim of withdrawal on his serious falling out with Minicone -- to the point that Minicone shotgunned Inserra's home -- in the early 1980's and that at that time Minicone had assumed a strong position within the enterprise. The dispute between Minicone and Inserra arose over the collection of money from gamblers. Inserra had collected the money but kept Minicone's share because Minicone owed him money. Minicone was so incensed that he shot out the windows of Inserra's kitchen. At a sit-down with enterprise boss Falange, they were ordered to settle their differences. Although Inserra and minicone apparently remained on less-than-friendly terms, there is evidence that Inserra maintained his connection with the conspiracy. In January 1988, Inserra

asked Benedetto Carcone for 9 mm. bullet, although the ammunition was not supplied to him. In April 1988, Inserra stopped by the Swap Shop and told Carcone to get word to Falange that "there's something f---ing coming down."

We hold that there was sufficient evidence to support the jury's finding that Inserra had not withdrawn from the conspiracy.

(C)

Inserra and Zogby also contend that the district court failed to properly instruct the jury on the RICO counts. Specifically, they contend that the court failed to inform the jury that the predicate acts must be related to each other and to the enterprise. With respect to the requirement that the predicate acts be related to the enterprise and to each other, the court clearly instructed the

jury that:

> "The government must still convince you, beyond a reasonable doubt, that these predicate racketeering acts were united or related to each other in such a way that you can honestly say that you have been convinced beyond a reasonable doubt that there is a pattern of racketeering which links at least two of these acts as to each Defendant to the pattern which the government alleges...[I]t is the quality and nature of those acts and how they are related to each other and to the alleged enterprise which, upon sober and reasonable reflection, you may say do or do not make out a consistent and unifying pattern of conduct through which the enterprise conducted its affairs."

Moreover, the court instructed the jury that:

> "The acts of racketeering must also be part of a continuing course of conduct. The continuity required refers either to a closed period of related conduct or to past conduct that by its nature projects into the future with the threat of repetition."

We hold that the district court

properly instructed the jury regarding the requirement that the predicate acts be related to each other and to the enterprise.

(D)

Minicone, Inserra, Russell Carcone, and Zogby contend that a mistrial should have been declared because of the "grossly prejudicial incidents" they say were attributable to the prosecution. "[R]eversing a criminal conviction for prosecutorial misconduct is a drastic remedy that courts generally are reluctant to implement." United States v. Valentine, 820 F.2d 565, 570 (2 Cir. 1987). There can be no reversal unless appellants can demonstrate "substantial prejudice" which deprived them of their right to a fair trial. Id.

Zogby claims that the jury was tainted during jury selection by the comment of one

prospective juror to the effect that another prospective juror, after being excused, had indicated to another prospective juror that the case was about "the mob". The latter and those within earshot subsequently were excused. Another prospective juror commented that the indictment read like a novel, and a third prospective juror, who subsequently was excused, made a joking reference about organized crime. Although one of the prospective jurors who heard these comments was not excused, the carefully instructed the jurors that the case did not involve the mafia and warned them not to discuss the case.

Inserra and Minicone also complain of three occasions during the trial when witnesses alluded to criminal conduct not charged in the indictment. The court struck such testimony and instructed the

jury to disregard it. Furthermore, after hearing argument on the issue, the court determined that the incidents were attributable to the government's witnesses, not to the prosecutor.

Appellants also claim that they were prejudiced by a witness who was in such poor condition (due to a car accident unrelated to the case) that he had to be brought on a stretcher into the courtroom to testify. The judge had not yet entered the courtroom. The jury reentered the courtroom before the judge. The witness subsequently was removed from the court and his testimony was taken by deposition. The court instructed the jury that the witness's injuries were the result of a car accident and were unrelated to this case.

We hold that the appellants have failed to demonstrate substantial prejudice which denied them their right to a fair

trial.

(E)

Minicone contends that a taped conversation between Pritchard and Inserra was not admissible against him as a statement of a conspirator made in furtherance of the conspiracy, e.g., Rastelli, supra, 870 F.2d at 837, because Pritchard, at the time of the conversation, was an agent of the government. United States v. Birnbaum, 337 F.2d 490, 494-95 (2 Cir. 1964). He contends that, since the tape was not redacted to exclude reference to him, he should have been granted a separate trial. Bruton v. United States, 391 U.S. 123 (1968).

Minicone's contention is without merit, since it is immaterial that Pritchard was working for the government at the time that the conversation was recorded. "So long as the declarant and

the party against whom the statement was offered in court were members of a conspiracy at the time the statement was made, any witness who heard the statement may recount it at trial, whether the statement was made to a conspiracy member or not..." 4 Weinstein & Berger, Weinstein's Evidence, ¶ 801 (d)(2)(E)[01], pp. 801-305 (1991); United States v. Long, supra, 917 F.2d at 701; United States v. Beech-Nut Nutrition Corp., 871 F.2d 1181, 1199 (2 Cir.), cert. denied, 493 U.S. 933 (1989). The district court's finding that the statement was intended to promote the goals of the conspiracy is reviewed according to the clearly erroneous standard. Long, supra, 917 F.2d at 701; Beech-Nut, supra, 871 F.2d at 1198-99. Certainly, this finding was not clearly erroneous.

Moreover, to overturn a conviction

based upon the denial of a severance motion, a defendant must show that he was so severely prejudiced that, in effect, he was denied a fair trial -- not only that his chances would have been improved at a separate trial. United States v. Scarpa, 913 F.2d 993, 1015 (2 Cir. 1990). We hold that Minicone's contention that the district court committed reversible error in refusing to grant his motion for a severance is without merit.

III.

(A)

Inserra and Minicone contend that the district court erred in sentencing them under the Sentencing Guidelines. We hold that Minicone's claims, including among others, that he was a minor or minimal participant in the crimes charged, are without merit. Inserra's claims that the Guidelines should not have been applied to

him because he withdrew from the conspiracy prior to November 1, 1987, when the Guidelines took effect. Since we have already held that Inserra failed to establish that he affirmatively withdrew from the conspiracy, his claim that the Guidelines should not have been applied to him is also without merit.

(B)

Inserra contends that the court improperly used the first degree murder guidelines to establish his base offense level. Although New York law would have categorized the murder of Marrone only as second degree murder, the task of the district judge was to find the offense level corresponding to the most analogous federal offense. Section 2E1.1. According to the New York Penal Law § 125.25, a person is guilty of murder in the second degree when, with intent to cause the death

of another, he causes the death of such person or third person. 18 U.S.C. § 1111 (1988) defines first degree murder as "willful, deliberate, malicious, and premeditated killing".

We hold that the district did not err in concluding that the most analogous federal offense was first degree murder under § 1111.

(C)

The government asks us to hold that the district court erred, as a matter of law, in using Zogby's solicitation of murder conviction only in calculating his criminal history and not in calculating his base level offense. The court applied Guideline §2E1.1, Note 4, which provides that:

> "[C]ertain conduct may be charged in the count of conviction as part of a 'pattern of racketeering activity' even though the defendant has

> previously been sentenced for that conduct. Where such previously imposed sentence resulted from a conviction prior to the last overt act of the instant offense, treat as ap prior sentence under § 4A1.2(a)(1) and not part of the instant offense...If this treatment produces an anomalous result in a particular case, a guideline departure may be warranted.

The government contends that since Note 4 applies only when a defendant previously has been sentenced for certain "conduct", and Zogby previously was sentenced only for soliciting a murder, Note 4 should not have barred the conduct charged and proved in this case -- the actual murder and activities leading up to that murder -- in calculating his base offense level.

This presents what appears to be an issue of first impression in our Court. Although the government's contention strikes us as having some merit, we hold that the district court reasonably

construed Note 4 to mean that the conduct underlying the previously imposed sentence should not be used in calculating the base level for the instant offense.

(D)

The government also contends that the district court erred in sentencing Minicone by departing downward to a total of 32 years and 7 months rather than imposing the statutory maximum of 40 years. The court was motivated by a desire to avoid the unfairness which would result from the "grave disparity" between his sentence and that of the co-defendants. The court felt that "to blindly impose two 20-year consecutive sentences for this Defendant would, in the Court's opinion, directly contradict one of the main goals in guideline sentencing, that is, to eliminate sentencing disparity." Disparity between the sentence of individual co-defendants,

however, is not a proper basis for the downward departure made by the district court here. United States v. Restrepo, 936 F.2d 661, 671 (2 Cir. 1991) (quoting United States v. Joyner, 924 F.2d 454, 460-61 (2 Cir. 1991)) ("To reduce the sentence by a departure because the judge believes that the applicable range punishes the defendant too severely compared to a co-defendant creates a new and entirely unwarranted disparity between the defendant's sentence and that of all similarly situated defendants throughout the country.").

We hold that the district court abused its discretion in granting Minicone a downward departure to avoid a disparity between his sentence and the sentence and that of his co-defendants. We therefore vacate Minicone's sentence and remand his case for the limited purpose of resentencing him in accordance with the

Sentencing Guidelines.

IV.

To summarize:

We hold that the evidence was sufficient to support appellants' convictions under the RICO statute, 18 U.S.C. § 1962 (c) and (d). We also hold that the district court properly instructed the jury on the necessary elements of the crimes charged. We further hold that the district did not err in refusing to declare a mistrial. With the exception of Minicone's sentence, we hold that the district court did not err in sentencing appellants and all convictions are affirmed. With respect to Minicone, we vacate his sentence and remand his case to the district court for the limited purpose of resentencing him in accordance with the Sentencing Guidelines. We find no merit in the remainder of the appellants' claims on

appeal.

Affirmed in part; vacated and remanded in part.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated term of the United States of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirtieth day of April, one thousand nine hundred and ninety-two.

UNITED STATES OF AMERICA,

-v.-

DOCKET NUMBER: 91-1014,-1015, -1018, -1020, -1062, -1319, -1334

MINICONE, ET.AL.

A petition for rehearing filed herein by counsel for appellant ANTHONY INSERRA and the panel that heard the appeal having granted said petition for rehearing to the extent of amending opinion. In all other respects the petition for rehearing is denied in an opinion filed on April 13, 1992.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and that no such judge has requested that a vote be taken

thereon.

ELAINE B. GOLDSMITH
Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

April 13, 1992

DOCKET NOS. 91-1014, -1015, -1018, -1020, -1062, -1319, -1334

UNITED STATES OF AMERICA

Appellee

v.

JACK J. MINICONE, also known as Jake, JACK ZOGBY, also known as Turk, ANTHONY J. INSERRA, BENEDETTO CARCONE, also known as Benny, RUSSELL E. CARCONE

Appellants

Before:

TIMBERS, MINER, and ALTIMARI,

Circuit Judges

Per Curiam:

The petition for rehearing of appellant Inserra is granted to the extent of amending our opinion and by adding the following immediately after Part III (B) on

page 1305 of the slip opinion:

"Inserra also contends that the application of the Guidelines to him violates of the Ex Post Facto Clause of the Constitution, U.S. Const. art. 1, § 9. Prior to November 1, 1987, a person convicted of a RICO conspiracy faced an indeterminate sentence of not more than 20 years. 18 U.S.C. § 1963 (superseded). Under the Guidelines, the sentence instead is based on the highest offense level applicable to the underlying racketeering activity, if that offense level exceeds 19. Guideline § 2E1.1. The highest offense level here was 43, based upon the 1976 murder, and calls for the 20 year sentence the district court imposed.

We have found that in general no Ex Post Facto violation occurs by application of the Guidelines to 'straddle crimes", that is, crimes beginning before the date

of the Guidelines, but continued thereafter. United States v. McCall, 915 F.2d 811, 816 (2 Cir. 1990); United States v. Story, 891 F.2d 988, 991-992 (2 Cir. 1989). In this case, Inserra was sentenced for a RICO conspiracy active between 1973 and 1989. While Inserra himself committed no predicate acts after the date of the Guidelines, he did not withdraw from the conspiracy, and therefore remains fully liable for the acts of co-conspirators. United States v. Bafia, 949 F.2d 1465, 1477 (7th Cir. 1991).

We recognize, as unique to Inserra's case, that no act of any conspirator committed during the guidelines period, even if charged to Inserra, could result in the 20 year sentence imposed, and that the length of Inserra's sentence is determined solely on the basis of pre-Guidelines conduct. We note, however, that recidivist

statutes, which operate similarly in this respect, do not violate the Ex Post Facto Clause even if enacted after the commission of the past crimes forming the basis of the recidivist penalties. Gryger v. Burke, 334 U.S. 728, 7342 (1948) (citations omitted) ('The [recidivist sentence] is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes. It is a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one.')

The RICO conspirators in this case continued to act after the effective date of the law here being challenged, with full notice of the consequences. As in the case of the recidivist statute, fair warning of the penalty existed notwithstanding that the penalty itself is mechanically a function of a crime committed prior to the

passage of the sentencing law. Since Inserra did not withdraw from the conspiracy, he therefore may be charged with notice that his co-conspirators had when they acted. The fair notice and reliance purposes of the Ex Post Facto clause, Miller v. Florida, 482 U.S. 423, 429-430 (1987), are not violated by the application of the Guideline to Inserra."

In all other respects, the petition for rehearing is denied.